IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 7TH FEBRUARY 2007 / 18TH MAGHA 1928

RSA.No. 146 of 2007()

AS.116/2005 of SUB COURT,NEYYATTINKARA
OS.372/2003 of II ADDL.M.C.,NEYYATTINKARA

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APPELLANTS/APPELLANTS/DEFENDANTS:

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1. VELAPPAN NAIR, AGED 60,
S/O. SIVARAMAN PILLAI, VALLATHU VEEDU,
THIRUPURAM DESOM, THIRUPURAM VILLAGE.

2. MOHANAN NAIR, AGED 52,
S/O. SIVARAMAN PILLAI OF -DO- -DO-.

BY ADV. SRI.R.T.PRADEEP
SRI.V.VIJULAL

RESPONDENTS: RESPONDENT/PLAINTIFF:

VASANTHA, D/O. OMANA AMMA,
K.V. SADANAM, PELIYAMKONAM DESOM,KULATHOOR VILLAGE

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 07/02/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

R.S.A.NO.146 OF 2007

Dated this the 7 th day of February, 2007.

J U D G M E N T

Appellants are defendants in O.S.372/03 on the file of Munsiff Court II, Neyyattinkara. Respondent is the plaintiff. Respondent filed the suit seeking a decree for permanent prohibitory injunction contending that plaint A schedule property originally belonged to husband of respondent under Ext.A1 sale deed and on his death it devolved on respondent and her children and respondent has been in possession of the property and plaint B schedule property was purchased by respondent under Ext.A2 sale deed for using it as a pathway to plaint. Appellants have no right over plaint schedule property and they are attempting to tress pass into plaint B schedule property and it is to be restrained. Appellants contended that they have right of way through plaint A and B schedule properties and respondent is not entitled to the decree sought for. They filed a counter claim seeking decree for declaration of right of easement over the way passing through plaint A schedule property and plaint B schedule property contending that they have been using that way for more than 40 years and they have no other way. Learned Munsiff on the evidence of PW1 and PW2, DW1 and CW1 and Ext.A1 to A4, C1 to

C4 held that appellants failed to establish a right of easement by prescription through plaint A schedule property or plaint B schedule property and they have no right over plaint schedule properties and respondent is entitled to the decree for injunction. Appellants challenged the decree and judgment before Sub Court, Neyyattinkara in A.S.116/05. Learned Sub Judge after re-appreciation of evidence confirmed the decree and judgment and dismissed the appeal. It is challenged in this second appeal.

2. Learned counsel appearing for appellants was heard.

3. Arguments of learned counsel appearing for appellants was that courts below did not properly appreciate the evidence and omitted to take note of the specific case of respondent that plaint A schedule property was surrounded by a granite foundation and hollow bricks wall over it and evidence establish that there was no such wall and in such circumstances courts should have accepted the case of appellants that appellants and their predecessors have been using the way through the properties for the last more than 100 years and therefore should have granted the decree sought for in the counter claim and the decree granted in favour of respondent is unsustainable and is to be set aside. Learned counsel argued that the substantial

question of law involved in the second appeal is whether the absence of a compound wall on all the four sides with burn bricks or hollow bricks as claimed by the respondent does not strengthen the case of appellants that they and their predecessors have been using the way through the property for more than 100 years as claimed by them and if so whether the appellants are not entitled to the decree for declaration of right of easement by prescription and whether respondent is entitled to the decree granted by the courts below.

4. Plamoottukada public road is lying to the west of the plaint schedule properties. The family property of appellants is lying to east of plaint A and B schedule properties. There is admittedly a way leading from the road which runs towards the east and reaches plaint A schedule property belonging to respondent. Plaint B schedule property is that way. It was purchased by respondent under Ext.A2 in 2002. According to appellants there is a way through the property of respondent viz. plaint A and B schedule properties leading to property which lies to the farther east where appellants are residing. It is the specific case of appellants that they and their predecessors have been using the way for the last more than 100 years and therefore they have a right of way through plaint A and B schedule properties

belonging to respondent. Though a right of easement by necessity was claimed by them, courts below have found that appellants are not entitled to a right of way by easement of necessity. Though appellants contended that plaint A schedule property was purchased by their deceased brother, there is no case for appellants that the plaint A schedule property and the property lying to its east where appellants are residing originally belonged to one owner and there was a splitting of the tenement and by such severance their property cannot be enjoyed without a way through the plaint A schedule property. In such circumstances appellants are not entitled to claim a right of easement by necessity, even if appellants have no other way. Unless there was a splitting up of the tenement and as a result the dominant tenement cannot be used without using the other as a way, appellants cannot claim a right of easement by necessity. Hence on that ground alone the right of way by easement of necessity claimed is unsustainable.

5. Then the only question is whether appellants have established a right of way by easement of prescription.

6. A reading of the counter claim shows that the necessary ingredients to constitute a right of easement by prescription, was not

pleaded in the written statement, though there was pleading that they and their predecessors have been using the way for the last several years without any obstruction. There is no case that the alleged use of way was as of right or as an easement. It was only contended that at present appellants are using it uninterruptedly openly and peaceably and without obstruction and thereby they have prescribed a right of way by easement of prescription. There is no pleading that the predecessors of appellants have been using the way as of right and as an easement which are essential to establish a prescriptive right. Therefore even if their predecessors have been using that way as pleaded, appellants are not entitled to tag on that usage, when that usage was neither as of right or as an easement.

7. Whatever it be, learned Munsiff and learned Sub Judge on appreciating the evidence found that there is no way aged more than 20 years through the plaint A schedule property as claimed by the appellants. If appellants have been using a way through plaint A schedule property, for more than 20 years to enable them to claim right of way by easement of prescription, there should exist a way of atleast more than 20 years old. Courts below on evidence found that that there was no such way. It is a finding of fact, which cannot be

disturbed in exercise of the jurisdiction under Section 100 of Code of Civil Procedure. On the evidence courts found that appellants failed to establish that they have been using the disputed way through plaint schedule properties for more than 20 years as of right and as an easement. In such circumstances appellants are not entitled to the decree for declaration sought for in the counter claim. Even though case of respondents was that plaint A schedule property was surrounded by a granite foundation and hollow bricks wall over it was not proved, that by itself will not enable appellants to claim that they have prescribed a right of way, when appellants failed to establish the necessary ingredients to constitute a right of way. As appellants are not entitled to a right of way through the plaint A and B schedule properties and it is established that appellants are claiming such a right, respondent is entitled to the decree granted by the courts below. No substantial question of law arise in the second appeal.

Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR,
JUDGE.

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